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SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1956

MA CHUCK MOON and
MA CHUCK WOON,
Petitioners,

vs.

JOHN FOSTER DULLES,
Secretary of State of the United States;
HERBERT BROWNELL, JR., Attorney
General of the United States, and
JOHN P. BOYD, District Director
of Immigration and Naturalization,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILL G. BEARDSLEE
Counsel for Petitioners

OFFICE AND POST OFFICE ADDRESS:
1201 NORTHERN LIFE TOWER
SEATTLE 1, WASHINGTON

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on October 1, 1956.

CITATION TO OPINION BELOW

The District Court filed a written memorandum opinion (R. 44-62).

The opinion of the Court of Appeals (R. 78-81) transmitted by the Clerk of the Court of Appeals for the Ninth Circuit by letter dated November 20, 1956, is reported in 237 F. 2d (page 241).

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1956 (R. 78-81). A petition for rehearing was filed October 30, 1956, and denied November 15, 1956 (R. 83).

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether Chinese who were born nationals of the United States and who are threatened with deportation as aliens for having perjured themselves and thereafter recanted, in a former trial of a suit for declaratory judgment under Section 903, Title 8 U.S.C.A. and Section 2201, Title 28 U.S.C.A., and whose action was dismissed for lack of sufficient evidence may seek relief under the provisions of Sec. 1503(a), Title 8 U.S.C.A., when threatened with deportation by the Director of Immigration and Naturalization.

2. Whether Chinese who were born nationals of the United States, when threatened with deportation as aliens by the District Director of Immigration and Naturalization may have their national status judicially determined in advance of an administrative hearing on warrants of deportation.

3. Whether the dismissal of the former action under Sec. 503 of the Nationality Act of 1940, 54 Stat. 1171 (Sec. 903, Title 8, U.S.C.) for lack of sufficient evidence is *res judicata* in an action brought under Sec. 1503(a), Title 8 U.S.C., 66 Stat. 273, C. 477, Title III, Ch. 3, Sec. 360) and 2201 U.S.C., Title 28, U.S.C. (62 Stat. 964).

STATUTES INVOLVED

The statutory provisions involved are Sec. 1503(a), Title 8 U.S.C., c. 477, Title III Ch. 3, Sec. 360, 66 Stat. 273); Sec. 2201, Title 28 U.S.C. (62 Stat. 964 C. 648, June 25, 1948, amended May 24, 1949, C. 139, Sec. III, 63 Stat. 105); Sec. 241 (a) (4) of the Immigration and Nationality Act of 1940, relating to the deportation of aliens having committed the crime of perjury.

STATEMENT

Petitioners, Ma Chuck Moon and Ma Chuck Woon, were born United States Nationals in Tong Lung Village, China, on July 12, 1925 and September 12, 1933, respectively, as the lawful sons of Ma Tarn Sun, a United States citizen, and Wong Shee, a National of China. (R. 9, 12, 13-26)

While petitioners were still in China their father, Ma Tarn Sun instituted an action on their behalf under Section 503 of the Nationality Act of 1940 (Sec. 903, Title 8 U.S.C.), alleging they had been denied a right or privilege of an American National. (R. 5)

The District Court ordered the Secretary of State to issue travel documents to enable petitioners to come to the United States to testify in their own behalf and although petitioners arrived in the United States at the Port of Seattle on September 5, 1952 (R. 4) in possession of cer-

tificates of identity issued to them by the American Consulate at Hong Kong, British Crown Colony, China, a trial was not had until January 7, 1954, resulting in a judgment of dismissal for lack of sufficient evidence on April 30, 1954. (R. 40, 41)

During the trial of that action evidence was offered and admitted to show that at Hong Kong, China, petitioners gave to the American Vice Consul written statements, under oath, to the effect that one Ma Chuck Wun, also seeking a travel document was not their blood brother. Petitioners, at that trial denied having made such written statements but subsequently recanted. (R. 37, 38, 3a)

Criminal informations were filed by the United States Attorney against the petitioners charging them with perjury.

To these informations petitioners pleaded guilty and were sentenced to the United States

Penitentiary at McNeil Island for terms of three and one-half and two and one-half years, respectively.

On February 2, 1955, petitioners while confined in the penitentiary filed an action for declaratory judgment as to their national status under the provisions of Sec. 1503(a), Title 8, U.S.C., against John Foster Dulles, as Secretary of State of the United States. (R. 3, 4, 5) To this complaint a motion was interposed by the United States Attorney on February 18, 1955, for dismissal on the ground that the District Court was without jurisdiction over the person of defendant (R. 5, 6) and an amended motion to dismiss on March 28, 1955, on the doctrine of *res judicata*, supported by the affidavit of an Assistant United States Attorney. (R. 6, 7, 8)

Affidavits were filed by petitioners in re-

sistence of this amended motion, April 22, 1955. (R. 9-16)

On July 29, 1955, petitioners filed a motion for summary judgment (R. 13) in their favor supported by the affidavit of their father, Ma Tarn Sun (R. 13-16), after having been advised that John P. Boyd, District Director of Immigration and Naturalization had caused to be issued warrants of arrest seeking the deportation of petitioners as aliens for having committed the crime of perjury. (R. 16-21)

On September 21, 1955, upon motion therefor the District Court entered an order permitting the filing of an amended complaint making John P. Boyd a party defendant (R. 25-26) and alleging petitioners had been denied rights and privileges of American Nationals in that the Director of Immigration sought petitioners deportation as aliens for the crime of perjury although the said John P. Boyd and his predeces-

sors in office have recognized petitioners' father, Ma Tarn Sun, as an American Citizen for more than twenty-five years. (R. 27-30)

Herbert Brownell, Jr., United States Attorney General, was added as an additional defendant on October 24, 1955. (R. 42, 43)

On December 31, 1955 the District Court filed his memorandum opinion (R. 44) and thereafter findings of fact, conclusions of law and judgment were entered January 27, 1956. (R. 62)

While the memorandum opinion filed by the District Court December 31, 1955, refers to the warrants of arrest for deportation of petitioners, no mention whatever is made thereto in the findings of fact. The decision of the District Court was based entirely on the doctrine of *res judicata.*

The District Court placed reliance princi-

pally upon its interpretation of *Acheson* v. *Furusho*, 212 F. 2d 284 from the Ninth Circuit where the question of the applicability of Rule 25 (d) Federal Rules of Civil Procedure relating to the substitution of parties as officers of the United States after a vacancy in office has occurred, was involved. The appellate court held such rule has no application to cases of this nature.

The District Court also relied upon Rule 41 (b) of the Federal Rules of Civil Procedure (App. A) to the effect that a dismissal for insufficiency of the evidence operates as an adjudication upon the merits to sustain its application of the doctrine of *res judicata*. (R. 60)

The District Court also held that the action was one against the United States (R. 59), contrary to the express language used by the Court of Appeals for the Ninth Circuit in the case of *Acheson* v. *Furusho*, supra. Answering the con-

tention there made by the United States attorney that the suit was in effect one against the United States the appellate court held the action not to be one against the United States. (p. 290)

Yet in the instant case Rule 41(b) Federal Rules of Civil Procedure was applied to support the doctrine of *res judicata* by both the District Court and the Court of Appeals. (R. 60)

Both the District Court and the Court of Appeals, decided this case upon the original complaint and not on the amended complaint.

The original complaint was against the Secretary of State while in the amended complaint petitioners sought relief against the District Director of Immigration and Naturalization to prevent petitioners' deportation *as aliens.*

In petitioners' amended complaint (R. 29, Par. VIII) it is alleged that petitioners have

been denied rights and privileges of American citizens (nationals) by John P. Boyd, District Director of Immigration and Naturalization in that said Director has charged each of petitioners, as follows:

> "Whereas, from evidence submitted to me, it appears that the alien, Ma Chuck Moon (Ma Chuck Woon) who entered this country at Seattle, Washington, on the 9th day of September, 1952, has been found in the United States in violation of the Immigration Laws thereof and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to-wit: Section 241(a)(4) of the Immigration and Nationality Act, in that he has been convicted of a crime involving moral turpitude committed within five years after entry and sentenced to confinement therefor in a prison or corrective institution for a year or more, to-wit: Perjury. * * *" (R. 16, 17, 18)

Because of the disposition made of this case under the doctrine of *res judicata* by both the District Court and the Court of Appeals neither

the District Court nor the Court of Appeals for the Ninth Circuit passed upon the question of the rights of petitioners under the fifth amendment to the Constitution of the United States (Appendix A) to a trial de novo on the question of the deportability of petitioners.

In this respect there appears a diversity of opinion between the Ninth and Third Circuits as reflected in the recent case of *Delmore* v. *Brownell*, 236 Fed. (2d) 598 from the Third Circuit and for that reason the decision below should be reviewed.

REASONS FOR GRANTING THE WRIT

I.

Application of the doctrine of *res judicata* has no place in a case of this nature because in the case of *Acheson* v. *Furusho*, *supra*, it was distinctly held that "*the statutes and court rules do not reasonably apply to Section 903 but is*

inconsistent with the situation found in Section 903 cases, neither the statute nor the rules should be applied to proceedings under that section. And we hold this opinion even though it would seem to appear from the face of the statute or rule that officer parties in Section 903 cases are not excepted." (Appendix B, R. 78-81)

There the court was dealing with Rule 25 (d) Federal Rules of Civil Procedure (Appendix B.) while here the District Court predicated its application of the doctrine of *res judicata* on Rule 41(b) Federal Rules of Civil Procedure which was followed and affirmed by the Court of Appeals. (Appendix B.) without taking into consideration that the District Director of Immigration and Naturalization was not a party to the prior action.

II.

The petitioners here, as in *Barber* v. *Gonzales*, 347 U.S. 637 never made entry into the

United States in the strict sense of the word. They were born Nationals of the United States, in China of Ma Tarn Sun, a recognized American Citizen, and Wong Shee, a Chinese National (R. 13).

Petitioners came to the United States under certificates of identity as American Nationals on September 5, 1952, for the purpose of prosecuting an action for declaratory judgment as to their nationality status (R. 46), which was tried nearly two years later and dismissed for insufficient evidence. (R. 54)

Within the five year period fixed by Sec. 1503 (a) Title 8, U.S.C. (66 Stat. 273, Ch. 477, Title III Ch. 3 Sec. 360) petitioners, while in the United States commenced the instant case against John Foster Dulles, as Secretary of State of the United States, (R. 3-5)

Subsequently John P. Boyd, District Direc-

tor of Immigration and Naturalization, issued warrants of arrest for deportation of petitioners as aliens (R. 17, 19, 21), whereupon a motion was filed by petitioners, supported by affidavit, for permission to amend the complain making John P. Boyd, District Director of Immigration and Naturalization, a party defendant (R. 25) which was granted (R. 26) and an amended complaint was filed seeking relief from the threatened deportation. (R. 27-30)

III.

Another and equally important reason for a review of the decision below is that the judgment below is based upon a determination that petitioners are presently aliens, despite the fact that their father, Ma Tarn Sun, in his affidavit (R. 13) has stated he was personally present in China at the time of the birth of each of petitioners and has positively identified petitioners as his blood sons and that the records of the Immi-

gration and Naturalization Service further show these facts. (R. 9-21) This is nowhere denied.

Petitioners' national status is closely akin to that of citizenship, but is distinct from the status of an alien who is "one born out of the jurisdiction of the United States and who has not been naturalized under their constitution and laws. *Low Wah Suey* v. *Backus*, 225 U.S. 473.

Petitioners were born nationals and owe no dual allegiance or nationality. *Toyota* v. *United States*, 268 U.S. 402; *Gonzales* v. *Williams*, 192 U.S. 1.

Nationality cannot be equated with alienage, and therefore should not be subject to forfeiture or impairment without some voluntary act of expatriation or renunciation.

In *Perkins* v. *Ely*, 307 U.S. 325, 337, this court held that abrogation of the right to elect

nationality must be based upon explicit language of a statute and that rights of citizenship should not be destroyed by an "ambiguity."

Certainly the same consideration should apply to loss of nationality, and even assuming that congressional power to decree resident nationals aliens, the exercise of such power, being in effect a declaration of forfeiture, should never be presumed. On the contrary, a doubtful statute or rule should be construed to avoid such results.

The Circuit Court of Appeals for the Ninth Circuit in the *Furusho* case, *supra*, so held in passing upon Rule 25 (a) Federal Rules of Civil Procedure, and in a case of this kind the same reasoning may logically be applied to Rule 41 (b) especially where, as in this case, the construction given Rule 41 (b) by the court below result not only in a forfeiture of nationality, but also in "the equivalent of banishment or

exile". *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10. In view of the importance of the question involved, the drastic consequences of the conclusions of the court below, this court should call for a review by certiorari.

IV.

A further and important reason for the granting of the writ is that there is a diversity of opinion between the Third and Ninth Circuit on the question of deportability of persons situated as are petitioners.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

I.

The Fifth Amendment to the United States Constitution:

> "No person shall be * * * nor deprived of life, liberty, or property, without due process of law * * *."

II.

Act of June 27, 1952, C. 477, Title III, Ch. 3, Sec. 360, 66 Stat. 273, effective December 24, 1952: Sec. 1503 (a) Title 8, U.S.C.A.

DENIAL OF RIGHTS AND PRIVILEGES AS NATIONAL — PROCEEDINGS FOR DECLARATION OF UNITED STATES NATIONALITY.

(a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or

official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of Section 2201 of Title 28, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except, that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such case is conferred upon those courts."

III.

Rule 41 (b) Federal Rules of Civil Procedure, Title 28 U.S.C.A.; (as amended Decem-

ber 27, 1946, effective March 19, 1948):

(b) *Involuntary Dismissal — Effective thereof.*

For failure of the plaintiff to prosecute or to comply with these rules or of any order of the court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the laws the plaintiff has shown no right to relief. In an action tried to the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all of the evidence.

If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and

any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

APPENDIX B

Opinion of the court below.

The opinion of the Court below is contained in the transcript (R. 78, 79, 80 and 81.)

Petition for rehearing or hearing en banc in the Court of Appeals for the Ninth District.

The decision in this case is apparently bottomed on the original and *not the amended complaint*, by which John P. Boyd, District Director of Immigration and Naturalization was brought into the case.

The respondent Boyd issued warrants of arrest for each of the appellants seeking their deportation as *aliens* for having committed perjury in the former case.

The amended complaint joining the District Director of Immigration and Naturalization as a party defendant alleges that plaintiffs have been *denied by said Director* rights and privileges as American Nationals (R. 29) in that he has issued warrants of arrest for deportation, charging plaintiffs as follows:

> "Whereas, from evidence submitted to me, it appears that the alien (Ma Chuck Moon), Ma Chuck Woon, who entered this country at Seattle, Washington, on the 9th day of September, 1952, has been found in the United States in violation of the Immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to-wit: Section 241 (a) (4) of the Immigration and Nationality Act, in that he has been convicted of a crime involving moral turpitude committed within five years after entry and sentenced to confinement therefore in a prison or corrective institution for a year or more, to-wit, Perjury." (R. 18)

Plaintiffs on July 29, 1955, moved for

summary judgment. (R. 13) Defendants moved for summary judgment September 21, 1955, *under the amended complaint* (R. 30), and it was error for the Court to deny appellants' motion.

To deny plaintiffs their day in court is to deny them rights vouchsafed them under the Fifth Amendment to the Constitution of the United States.

> The denying of a judicial remedy to a citizen in a controversy affecting his citizenship, otherwise judiciable, would be in violation of the Fifth Amendment to the Constitution.

Tijerina v. *Brownell*, 141 F. Supp. 266 (Tex.), citing *Acheson* v. *Yecking Gee* (9 Cir.) 184 F. 2d 134, and *Acheson* v. *Mariko Kuniyuki* (9 Cir.) 189 F. 2d 741.

STARE DECISIS

In the opinion filed in the instant case on

October 1, 1956, written by Judg Orr and concurred in by Judges Pope and Fee, the writer of the opinion without making any reference whatsoever to the Furusho case said (p. 3 slip sheet):

> "We find no merit in the contention of appellants that since there is a difference in the parties named in No. 2749 and No. 3879, res judicata does not apply. The first action was brought by Ma Tarn Sun on behalf of Moon and Woon; however they were in fact plaintiffs there as they are here. In No. 2749 the action was against the Secretary of State, and in No. 3870 the Attorney General of the United States was defendant. This difference is not sufficiently material as to prevent the application of res judicata. No. 2749 and No. 3870 are in effect suits against the United States."

The opinion goes on to quote from the case of *Sunshine Coal Co.* v. *Adkins*, (1940) 310 U.S. 381, 402, 60 S.Ct. 907, 84 L.Ed. 1263, in which it was held there is privity between officers of

the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government.

That case, we assert, neither raised nor discussed any denial of a constitutional right and is the highest authority for the questions there raised which are entirely foreign to the constitutional question raised by appellants against the District Director of Immigration and Naturalization and the Attorney General of the United States *who seek to deport appellants as aliens* while appellants claim and have by affidavit of their father established without any denial on the part of any of the appellees and particularly the Director of Immigration and Naturalization and the Attorney General that they are in fact American Nationals and entitled under the Constitution to have their day

in court on that defense to the deportation proceedings instituted against them.

In *Espino* v. *Wixon* (9 Cir.) 136 F. 2d 96.

Judge Orr, who wrote the opinion in the instant case and who with Judge Pope sat on the *en banc* case of *Acheson* v. *Furusho*. 212 F. 2d 284, the personnel of which sat thereon consisted of Chief Judge Denman and Judges Stevens, Healy, Bone, Orr and Pope, in refuting the claim of the United States Attorney that the Furusho and other cases under consideration were in fact suits against the government said: (p. 290)

> "*In the first place the government may not be sued without its consent and it has been and sill is a governmental policy to grant consent sparingly.* To enact a law making every suit against the head of a governmental department virtually against the department over which he presides, would be widening the consent greatly.
>
> "Besides, it might well result in the direc-

> tion of a successor to an ex-official to do what he believed to be contrary to his duties without the opportunity to defend his contentions. Other difficulties are easily conjured."

After much research we have been unsuccessful in finding any adjudicated citizenship case in which the doctrine of res judicata has ever been applied but, as stated at page 26 of our opening brief, in the case of *Tom We Shun* v. *Brownell*, 227 F. 2d 40, 41, we find this expression:

> "The present question whether review may be had on a complaint filed after the 1952 Act took effect, is not res judicata, since it neither was or could have been decided in the previous suit filed before the Act took effect."

At the time the former suit was tried in 1954 the question here presented—denial of a right by the Director of Immigration and Naturalization—was not involved "*since it neither was or could have been decided in the previous*

suit filed before the Act took effect" because it was not until the 12th of May, 1955, more than a year after judgment of dismissal of the first case that the appellee Director of Immigration and Nationalization issued and served his warrants of arrest for deportation of appellants as aliens, that question arose.

These questions were elaborately argued and thoroughly presented in our opening brief.

The affirmance of the district court's judgment in this case on the doctrine of res judicata is tantamount to a denial of rights vouchsafed to appellants in their defense of the deportation proceedings under the Fifth Amendment to the Constitution of the United States and it is earnestly requested that the question be re-examined to the end that appellants may not be foreclosed from proving in any future administrative proceeding seeking their deportation their true national status.

It is therefore respectfully requested that a re-hearing be granted.

Respectfully submitted,

WILL G. BEARDSLEE
Attorney for Appellants

CERTIFICATE

I, Will G. Beardslee, hereby certify that in my professional judgment the petition for re-hearing herein is well founded and it is not interposed for delay.

WILL G. BEARDSLEE
Attorney for Appellants.

This petition was denied. (R.-83)